

HOW CAN YOU DEFEND THOSE PEOPLE?

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We all are here today because Monroe Freedman (1928–2015) came before us. Like Ellen Yaroshefsky and Abbe Smith, Monroe Freedman was a rare duality—criminal defense lawyer and earthy practitioner in one sphere, while also a distinguished scholar and professor in another.

Professor Freedman was representing what we now call lesbian, gay, bisexual, transgender, and queer (“LGBTQ”) organizations in the late 1950s and early 1960s—well before the events following the raid of the Stonewall Inn,¹ and before anyone even acknowledged the names of those groups.² That is, he was representing gay and lesbian people when only the bravest of them identified themselves that way at all, even privately. And he served all others seeking to vindicate their own civil rights. Although he eventually represented members of Congress, he never stopped defending the poor.

In considering our debt to him and the time over which that debt has accrued interest, note that June 2016, which just passed, marked fifty years since his landmark article in the *Michigan Law Review*, entitled *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*.³

Hoping to honor Monroe Freedman, I speak today to “The Question”: How can you defend those people? Here, I refer intentionally to the title of the collection of essays that Abbe Smith and he edited, *How Can You Represent Those People?*⁴ I do not hope to improve upon

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1. Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1580-83 (1993).

2. See *id.* at 1558-64 (discussing the origin and progression of the homophile organization, the Mattachine Society, and its national chapters).

3. See generally Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

4. HOW CAN YOU REPRESENT THOSE PEOPLE? (Abbe Smith & Monroe H. Freedman eds.,

or even add to the essays in that book—which includes Monroe Freedman’s own answer to The Question. Indeed, I noted after I prepared these remarks that many of the points I would make appear in the essays that others wrote when I later read those. Unsurprisingly, many of us committed to criminal defense share an ethos. Also, I cannot match the elegance of Jim Castle’s distilled answer to The Question,⁵ which is worth your utmost consideration.

But I do not have to improve upon the fifteen essays in Smith and Freedman’s collection, and I do not have to match Jim Castle’s elegance. Because after practicing law for over thirty-one years, what my answer is hardly matters. What matters much more—really—is your answer, as you set out in the practice of law, whether you have not yet begun or are in the early years of practice. Your answer has much to do with who you will be as a lawyer—and not just if you choose criminal defense. Regardless of what you choose, your answer subsumes the values that you will embody as a lawyer.

All I can do usefully, then, is encourage you to come to your *own* answer to The Question—and maybe frame for you some of the less visible considerations embedded in The Question, which may inform your answer. I offer these four considerations. Why is The Question important? Why must we respect those who ask it? What will our answers reveal of us? Will we implement and live our answers?

First, why is The Question important? Because it reveals something about the questioner and because it is such a common question, it therefore reveals much about many of us and about our culture. Consider The Question slowly: How can you represent those people? It never is framed as “my people”; never even as “one of us” or “our people.”

Alienation, a need to assign the accused as the “other,” is embedded prominently in The Question. Implicitly but unmistakably, The Question rests on the belief that both questioner and you are above, superior to, that other: to “those people.” You and the questioner are the unstated “we,” having a side conversation on the sly, out of earshot of “those people.” The Question would not be put to you if you were one of them, in the questioner’s eye. So The Question is important, in part, because it lays bare the widely shared supposition that *we* do not commit crimes, *they* do; that *we* are better than *they*; and that *you* are committing class betrayal by coming to *their* aid, because *we* need protection from *them*.

The Question denies implicitly but completely an important truth: that *we all are criminals*. You are; I am. Have you ever smoked pot?

2013).

5. James Castle, *Why We Are Defenders*, 40 CHAMPION, July 2016, at 51.

Tried cocaine? Shared either with a friend? Sold some? Have you ever shoplifted? Groped a fellow student or kissed him or her while he or she was drunk? Have you ever vandalized a playground or an opposing school's property? Bootlegged music from the Internet? Broken into a garage or shed as a prank or while being stupid? Have you ever not reported all the tips you received at your job waiting tables? And for many of us, have you ever done worse?

About one in four Americans has a criminal record.⁶ The rest of us just have not been caught or perhaps had the good luck to avoid a permanent conviction.⁷ Much of the difference (if there is one) between “we” and “they,” then, is who gets caught and convicted—and why. You must explore those two questions on your own. Try to do that honestly, for this is why The Question is important: we live in a culture of near universal criminality, but who gets prosecuted and why remain unsettling and large issues. Ask yourself not who are they, but who do we imagine culturally is included in that alienated group of “those people” and why.

Second, regardless what you think it reveals of the questioner, why must the questioner have our respect? Because any one of us might have asked The Question ourselves, at some point in our lives; some of us probably have. Surely, some of the people we love do ask that Question. The questioner almost certainly is unaware of the assumptions embedded in The Question, let alone how unsound they are. The questioner may assume, rightly, that she never would commit a serious crime; she does not know that there can be no guarantee that she will not be accused of one, falsely or mistakenly. He does not know that he one day suddenly may become one of “those people,” perhaps through no act of his own. She does not know that one day someone she loves—her father, her son, her brother, her friend—statistically *will* become one of “those people.” He does not realize that someday he will need you.

And you may not realize that you also will need him and her. You will need the questioner as a juror; someone you must reach and persuade, rather than scoff at or dismiss. You will need the questioner as a judge, as someone who has your client in her hands. You will need the questioner as your friend or ally.

We cannot cure the alienation inherent in The Question by treating the questioner as alien to us or to our values. We cannot address the

6. *About We Are All Criminals*, WE ARE ALL CRIMINALS, <http://www.weareallcriminals.org/about> (last visited Apr. 10, 2017).

7. *See id.* (describing the work begun by the director of We Are All Criminals, Emily Baxter, “to inspire empathy and ignite social change through personal stories of crime, privilege, justice, and injustice” with the goal of “disrupting the barriers that separate us”).

implicit sense of superiority in *The Question* by treating the questioner as morally or intellectually inferior to ourselves. This is why we must respect the questioner.

Third, what will our answers reveal of us? Do we crave the status quo, the stability of the world as it is, the way most prosecutors (and most judges) crave it? Or do we take our chances with change—even chaos—on the belief that our world today is only a rough, penciled sketch of what it could be, and should be, if we all lived a greater commitment to the humanity of everyone and to assuring the stake of everyone in our shared earth?

Do we think that police violations of the U.S. Constitution are a regrettable but small price to pay for social order and for safety from “those people?” Or do we think that the lawlessness of those acting with the vast power of the sovereign is a greater threat to liberty and to our security than any crime by the poor or by the individual person ever will be? Do we look at the racial, ethnic, and class disparities surrounding us in the criminal justice system and say sympathetically how unfortunate all of those disparities are? Or do we rebel against them, urge action against them (even when that will threaten the status quo), and take action ourselves?

Will we seek to win, which is so much more frequent when you are aligned with the powerful or with the government, whose interest always is to preserve the social order as it is and to resist change? Or will we savor the occasional—even rare—win and relive it (maybe even improve on it) for years, as we hone our skills as raconteurs with our many losses and our scattered, savored wins? That is, will we have the sense of self-worth and stamina to lose for a living? And to sustain ourselves for months or years on the rare win?

Will we come to demand the ordinary, as it simplifies our days tending the assembly line of criminal justice, which works most smoothly and efficiently when every human being and every case is packaged neatly as a widget, identical in its ordinariness to all others? Or will we revel in the mischief of the extraordinary—mischief that we can make on behalf of the powerless in trying to discomfit the comfortable, alarm the complacent, and cause uncertainty to those who are certain about everything? In some way, will we jam a stick in the gears of that infernal assembly line that mechanically transports our clients to their doom or debilitation? That is, will we author or enjoy a good caper, like the great Wisconsin criminal defense lawyer Jim Shellow, who once concluded that our state crime laboratory seemed to identify all white powders as cocaine so then began to file motions to require the state crime laboratory to identify an unknown white powder

and stapled a plastic baggie of white powder to the motion—causing great consternation in clerks’ offices, judges’ chambers, and prosecutors’ offices? Or will we seek to remain ever among the “we” with those who ask The Question, hoping always to separate ourselves from the group of “those people”? Our answers to these subsidiary questions and others, all considerations in answering The Question, fundamentally determine who we are and will be as lawyers. This is what our answers reveal of us.

Fourth and finally, revealed this way to the world—to our families, friends, adversaries, judges, and employers—will we live with *and in* our answer? If we claim to be defenders, will we befriend the friendless and stand alone, if necessary, in defending the universally detested person? Will we separate the human being who is our client from the inhuman act he may have committed? Will we alone be unwilling to judge him only by the worst thing he ever has done? Will budding sympathy for our clients and for their victims eventually grow into mature and deeper empathy for the entire human family?

Indeed, will we get to the time in which we acknowledge silently, as we sit with our least fortunate clients, that there but for the grace of God go I? Will we eventually live with the knowledge that there is no “us” and no “them”; that the very premise of The Question is false, for there is no “those people,” there is only “we”? Will we come at last to understand that the implicit conundrum The Question presents—how can you advance a hypothesis of innocence when objective evidence and common sense so strongly suggest guilt—is not even the central conundrum of criminal defense work?

The central conundrum or seeming contradiction is that defenders of the accused resist and oppose the criminal justice system at the microscopic level of individual clients, often many times a day—all the while enabling that system at the macroscopic level by participating in it, serving as officers of the same courts that demean or even destroy our clients. That conundrum, and not the more technical one implicit in The Question, is the one we must resolve for ourselves, rather than for the cocktail partygoer who poses The Question. And if we cannot resolve that greater puzzle, that conundrum, or remove the tension of contradiction, will we at least in the end get to the point where we restate The Question this way: How can I *not* defend my people?⁸

8. See Barbara Babcock, “*Defending the Guilty*” *After 30 Years*, in *HOW CAN YOU REPRESENT THOSE PEOPLE?*, *supra* note 4, at 1, 11 (“It should not be ‘how can you defend’ but ‘how can you fail to defend.’”); see also Abbe Smith, *How Can You Not Defend Those People*, in *HOW CAN YOU REPRESENT THOSE PEOPLE?*, *supra* note 4, at 157, 163; Robin Steinberg, *Fair Play*, in *HOW CAN YOU REPRESENT THOSE PEOPLE?*, *supra* note 4, at 177, 182-83. I acknowledge my

If and when you come to restate The Question in some way like that, you will be a defender. You will be a defender at heart even if you never practice criminal defense. And as a defender, you will have found a vocation in law: a way of being, not just a job. You will let others look for jobs, or speak of wanting a life. In your vocation, you will *live* a life, melded with that vocation. You may well love that life, and love the lives of “those people”; *your* people; us.

debt to these three wonderful lawyers, and many others more generally.